Supreme Court, U.S.
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No. 91-1594

In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Were the courts below correct in concluding that Florida's ban on direct, in-person solicitation of new clients, which applies only to certified public accountants and not to accountants or other financial professionals, is not a content-neutral time, place, and manner restriction, but is instead an unqualified prohibition that violates the First Amendment?

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT

1. Respondent Scott Fane is a certified public accountant ("CPA") licensed by the Florida State Board of Accountancy, whose members are the petitioners in this Court. Mr. Fane has practiced as a CPA for the past ten years, and has been employed at two of the prestigious "Big Eight" accounting firms, Touche, Ross & Co. and Deloitte, Haskins & Sells. In July 1985, Mr. Fane moved from New Jersey to Homestead, Florida, where he wanted to establish a tax accountancy practice by contacting small and mid-sizes businesses, either in-person or over the telephone, to set up appointments during which he could explain his qualifications, the services he offers, and the fees he charges. However, Florida is one of four states that prohibits CPAs from engaging in direct, in-person solicitation of potential clients.[1]

Under Fla. Stat. § 473.323(1)(l), CPAs may be subject to

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[1] The others are Georgia, Texas and Louisiana. *See* Pet. App. at 4 nn.2 & 3.

disciplinary action, including license revocation, for "[e]ngaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech *as determined by the rules of the board*." (Emphasis added). The Board of Accountancy has adopted a broad prohibitory regulation, under which a "licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication." Fla. Admin. Code § 21A.24.002(2). The regulation further states that "any communication which directly or implicitly requests an immediate oral response from the recipient" constitutes an unlawful solicitation, and that "[u]ninvited in-person visits *or* conversations *or* telephone calls to a specific potential client are prohibited." *Id.* § 21A.24.002(3) (emphasis added). As a result, Florida law forbids Mr. Fane from visiting or telephoning potential clients, and even from initiating a conversation with a potential client if he intends to solicit the potential client's business.

2. Mr. Fane brought this action for declaratory and injunctive relief on August 17, 1988, challenging the Board's anti-solicitation regulation on the ground that it violated his First Amendment right to engage in commercial speech. Mr. Fane also alleged that, by singling out only CPAs -- and not the other financial professionals against whom CPAs compete -- the ban unfairly discriminated against CPAs in violation of the Equal Protection Clause of the Fourteenth Amendment. The sole justification offered by the Board was that the ban was needed to protect a CPA's integrity, independence, and objectivity in performing the "attest function," -- *i.e.*, the rendering of an independent opinion regarding a client's financial statements, such that those who use those statements can rely on their accuracy. Only some CPAs ever perform this function, and, even for those CPAs, it constitutes only a small portion of their work.

After hearing argument, the district court granted summary judgment to Mr. Fane, finding that the regulation violated the First Amendment because it did not further the asserted governmental interest of preventing collusion between businesses and CPAs when the CPA attests to the client's financial statements. Pet. App. B, at 5-10. Based on this conclusion, the court enjoined the Board from enforcing its regulation as it applied to CPA solicitation "in the business context." Pet. App. B, at 11. In light of its disposition on First Amendment grounds, the court did not reach Mr. Fane's equal protection claim. Because the Board did not seek any stay, respondent and other CPAs have engaged in solicitation since the district court issued its order in September 1990.

3. The Eleventh Circuit affirmed, with Judge Edmonson dissenting. Applying the analysis that this Court has established for evaluating restraints on commercial speech, *see Board of Trustees v. Fox*, 492 U.S. 469 (1989), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the court first assessed whether the ban served a valid state interest. Pet. App. A, at 8-9. The Board had argued that the ban was needed "to preserve and protect the public's ability to rely on the independence and objectivity of CPAs who are performing the attest function." *Id.* at 6. But the court rejected that claim, finding that "[n]owhere in the record . . . has [the Board] produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." *Id.* at 9.

The court also concluded that, even if there were a nexus between the ban and the asserted state interest, there were means less draconian than an all-out ban that would achieve the state's goal equally well. *Id.* The court reasoned that, although the ban was aimed at preserving the sanctity of the attest function, it applied to all work performed by CPAs, even though many CPAs, like Mr. Fane, never exercise the attest function because they do not render opinions on audits or financial statements. *Id.* The court also noted that a number of "[r]egulatory requirements exist in Floirda that can be utilized to preserve the attest function . . . [and that the] Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks." *Id.* at 10.

The court next addressed the Board's contention that the regulation should be given minimal scrutiny as a content-neutral time, place, and manner restriction. In rejecting this argument, the court concluded that the restraint cannot be so characterized because it "acts as an unqualified ban on in-person solicitation rather than regulating the details of when, where, and how" such solicitation may take place. *Id.* at 11. The court also held that the ban is not content-neutral because it is a speaker-specific prohibition "on a category of expressive activity" -- *i.e.*, the direct, in-person solicitation of potential clients. *Id.*

Finally, the court found that the Board's reliance on *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), was misplaced. The court reasoned that the factors that led this Court to uphold the ban on in-person solicitation by lawyers in *Ohralik* -- the possibility that a lawyer "trained in the art of persuasion" would use a face-to-face encounter to overreach and exert undue influence on a potential client -- are not present here. *Id.* at 13. In contrast to *Ohralik*, Florida's ban is not aimed at protecting prospective clients. Rather, it is intended to protect third parties who rely on financial statements from the possibility that in-person solicitation will somehow encourage CPAs to render dishonest opinions. On that issue, the court found *Ohralik* to be irrelevant. The Board timely filed a petition for rehearing and a suggestion for rehearing *en banc*, which were denied by Order filed on December 31, 1991.[2]

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court. The decision below is not in conflict with any ruling by a federal court or the highest court of any state. Nor are the issues presented by petitioners sufficiently weighty to deserve the Court's attention: the ruling below is entirely consistent with this Court's ruling in

[2] The Board's Petition, at 1 n.1, can be read to suggest that the Board filed *only* a suggestion of rehearing *en banc*, which would not have tolled petitioners' time to file their petition in this Court. However, respondent was *served* with both a suggestion of rehearing *en banc* and a petition for rehearing, which presumably were both filed. Thus, unless the petition for rehearing was served but not filed, respondent does not contest the timeliness of this petition.

Ohralik v. Ohio State Bar Ass'n; the restraint at issue here cannot properly be characterized as a content-neutral time, place, and manner restriction; and the ruling in Mr. Fane's favor does not jeopardize any valid state interest.[3]

1. Petitioners contend that the ruling below is at odds with *Ohralik v. Ohio State Bar Ass'n*. But, as the courts below made clear, the state interest justifying a blanket ban on lawyer solicitation in *Ohralik* is not present here. *Ohralik*, which focused on the in-hospital solicitation of a seriously injured young woman, rests on the premise that people in need of legal services are often emotionally vulnerable or unsophisticated, and thus may be incapable of defending themselves from exploitation by self-interested lawyers. The Court upheld a broad ban on lawyer solicitation because nothing short of a prophylactic rule would adequately protect potential clients under those circumstances.

As the Board readily concedes, its anti-solicitation ban has nothing to do with protecting prospective clients, who are knowledgeable businesspersons, from solicitations by CPAs, who, unlike lawyers, are not "trained in the art of persuasion." *Ohralik*, 436 U.S. at 465. Rather, the Board argues that the ban is needed to protect *third parties* who rely on financial statements, because the sophisticated business clients solicited by a CPA *might* try to induce the CPA into knowingly committing fraud by falsely attesting to a financial report. Nothing in *Ohralik* suggests that an outright ban would be appropriate where, as here, the state is seeking to prevent fraudulent activity, not protect a client from

[3] Petitioners also suggest that the district court erred in resolving this case on Mr. Fane's motion for summary judgment, an argument the court of appeals concluded was without merit because it found no factual disputes that would require resolution at trial. Pet. App. A, at 5 n.4. Petitioners also gave no indication in the district court that they objected to having the case resolved on summary judgment. They did not comply with the district court's order requiring a party opposing summary judgment to submit a "statement of material facts as to which it is contended that there exists a genuine issue to be tried;" they did not "set forth specific facts showing that there is a genuine need for a trial" as required by Rule 56(e), Fed. R. Civ. P.; and they did not file an affidavit pursuant to Rule 56(f), Fed. R. Civ. P., identifying any discovery that would be needed for the presentation of their case.

overreaching by a lawyer. Rather, this Court has repeatedly held that the mere opportunity "for isolated abuses and mistakes does not justify a ban on that mode of protected commercial speech." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982).

What is more, the basic premises of the Board's argument are transparently implausible and contradicted by the evidence. The Board's argument depends on its assumptions (a) that CPAs who engage in solicitation are more likely to compromise their integrity than other CPAs and (b) that a client interested in a "clean opinion" on a financial statement would be more likely to importune a CPA who called out of the blue than a CPA he had dealt with previously. Not only are these assumptions far-fetched, but, as both lower courts emphasized, there is not a shred of evidence that supports the Board's theory that in-person solicitation by CPAs is a breeding ground for improper activity. Thus, while no one disputes the legitimacy of the state's interest in preventing fraud, both courts below properly found no nexus between that interest and the anti-solicitation ban. Under this Court's precedents, it is the Board that bears the burden of "affirmatively establish[ing]" that the ban vindicates a substantial interest. *Board of Trustees v. Fox*, 492 U.S. at 480; *see also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985). Because the Board failed to present evidence that satisfies that burden, this case does not warrant review.[4]

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[4] Although neither court below reached this issue, it is clear that, to the extent the Board clings to the contention that the ban is needed to serve interests unrelated to the attest function, the regulation unfairly discriminates against CPAs in violation of the Equal Protection Clause of the Fourteenth Amendment. Under Florida law, CPAs, accountants, tax preparers, bookkeepers, and other financial professionals may lawfully engage in a broad array of accountancy, tax, and other financial service activities, except for the attest function. Yet only CPAs are subject to the anti-solicitation rule, and that prohibition extends to solicitations for *all* services performed by CPAs, not just those requiring attestation. Not only is this discrimination invidious, it is utterly irrational, since *only* CPAs are licensed and closely supervised by the State. *See* Fla. Stat. §§ 473.306-308 & 473.322-324. In the event that this Court grants review, Mr. Fane intends to continue to press his equal protection claim in order to defend the judgment below.

2. Even more strained is petitioners' contention that the ban is not really a ban at all, but is instead a content-neutral time, place, and manner restriction, that should be given minimal scrutiny. The fundamental flaw in this argument is that the Board's regulation does not simply regulate when, where, and how CPAs may engage in direct in-person solicitation, which are the hallmarks of a time, place, and manner restriction. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 43 (1986); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 643 (1981). Instead, the regulation acts as a flat, unqualified ban, and hence it cannot properly be analyzed under the time, place, and manner doctrine.

Moreover, this Court has repeatedly made it clear that "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or the subject matter of the speech." *Central Hudson*, 447 U.S. at 536; *accord Pacific Gas & Electric Co. v. Public Utility Commission*, 475 U.S. 1, 20 (1986). As the Court explained in *Boos v. Barry*, 485 U.S. 312, 320 (1988), a content-neutral speech restraint is one that can be "*justified* without reference to the content of the regulated speech." (Emphasis in original, citations omitted).

Applying these principles here, there is no question that the regulation "is justified *only* by reference to the content of the speech," *Boos v. Barry*, 485 U.S. at 321 (emphasis in original); indeed, the very purpose for the restraint is to suppress one category of speech entirely. What is more, the regulation has all of the attributes of a classic content-based restraint: it is a speaker-specific, unqualified ban on in-person solicitation of potential clients by CPAs. The rule forbids speech precisely *because* of its message; CPAs are free to say whatever they want, to whomever they please, whenever they want, *except* they are forbidden by the rule from asking, at all times, places, and manners, a potential client to give them business. In this respect, the ban is indistinguishable from speaker or content-specific restraints that the courts have consistently evaluated under the exacting standards applicable to restraints on speech and have been found unconstitutional. *See Boos v. Barry, supra* (ban on political picketing near embassies); *Shapero v. Kentucky Bar Ass'n*,

supra (ban on targeting mailings by lawyers); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ban on residential picketing); *Police Department of Chicago v. Mosley*, 416 U.S. 171 (1972) (ban on labor picketing). Because the rulings below faithfully applied these precedents, there is no reason for this Court to grant review.

3. Perhaps the most telling flaw in petitioners' presentation is their failure to address the practical significance of this case. That is not surprising, however, because the ruling will both spur competition within the CPA profession and increase the flow of information to the general public about the nature of the services rendered by CPAs and the availability and price of such services. Although petitioners imply that the ruling below could undermine the integrity of the attest process, the facts do not bear petitioners out.

First, the district court's injunction prohibiting the enforcement of the Board's regulation has been in effect for over nineteen months. During that time, Mr. Fane, as well as other CPAs, have been engaged in in-person solicitation of potential clients -- as the Board is aware. Surely, if the Board were genuinely worried about the threat to the attestation process from in-person solicitations by CPAs, it would not have stood idle for so long, but would have promptly sought a stay of the district court's order.

Second, as noted above, Florida is virtually alone in categorically banning in-person solicitation by CPAs. Most of the major commercial states, including New York, Illinois, California, Michigan, Massachusetts, Pennsylvania, for example -- whose commercial establishments rely on the attest function just as heavily as those in Florida -- impose no special restraints on solicitation by CPAs. If there were any substance to the Board's fears that in-person solicitation by CPAs is a breeding ground for fraud, there would be at least some evidence to that effect in those jurisdictions, but the Board has failed to point to any indication that these jurisdictions have experienced a problem.

Third, the Board fails to note that the American Institute of Certified Public Accountants ("AICPA") -- which is the CPA equivalent of the American Bar Association -- has deleted from

its by-laws a prohibition against in-person solicitation. In examining whether a solicitation ban was needed to preserve CPA independence in the attest function, the AICPA issued a lengthy report (R1-23-1) which concluded that "we are unaware of the existence of any empirical data supporting the theory that CPAs . . . are not independent of clients obtained by direct solicitation . . .." Report at 4. The report also noted that, while the Securities and Exchange Commission "has repeatedly recognized that independence is essential to protect the public's reliance on audited financial statements," it "has given no indication since the AICPA eliminated its prior ban on direct uninvited solicitation that it is concerned that this practice will unduly compromise independence in fact or in appearance." *Id.* at 32.

As is evident, petitioners' concerns about the effect of the ruling in Mr. Fane's favor are either misplaced or considerably overstated. Accordingly, this case does not warrant this Court's review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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